Office of Chief Counsel
Internal Revenue Service

memorandum

CC: [redacted]:TL-N-183-99
[redacted]

date: OCT 20 1999

to: Chief, EP/EO Division, [redacted] District
Attention: Revenue Agent [redacted]

from: District Counsel, [redacted] District, [redacted]

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subject: [redacted]
FICA Claims for refund

DISCLOSURE STATEMENT

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ISSUE

1. Whether the [redacted] has established that they are entitled to FICA refunds for non-medical resident students?

CONCLUSION

1. The [redacted] has established that they are entitled to FICA refunds for non-medical resident students if the claim procedures have been satisfied.

FACTS AND DISCUSSION

This is to follow-up on our February 24, 1999 memorandum. The [redacted] (hereinafter [redacted] retains medical interns and residents as part of its medical school curriculum. [redacted] also employees students to work at the universities. [redacted] has historically treated them as employees and withheld employee FICA taxes and paid employee and employer FICA taxes. Based on Rev. Proc. 98-16, it now takes the position that the medical residents are not subject to FICA taxes either under the Federal-State 42 U.S.C. § 418 agreement or because they qualify for the student exclusion. It has filed protective claims for refund aggregating $[redacted] of which the amount of $[redacted] is attributable to non-medical resident students and the amount of $[redacted] was attributable to medical resident students.

This memorandum addresses whether the non-medical resident student-employees at [redacted] meet the student FICA exception. We were advised on October 8, 1999 by Terri Hallihan of the Internal Revenue Service's National Office that the Internal Revenue Service is working with Chief Counsel to develop criteria for consideration of the medical resident claims. It is therefore premature for us to opine on the medical residents. We have however sought Field Service Advice, a copy of which is attached, in order to secure National Office assistance in the development and analysis of the applicability of the student exception for medical residents. We request that you initiate the additional factual development that is discussed in the National Office request.

Applicability of Rev. Proc. 98-16 to non-medical resident students:

While Rev. Proc. 98-16 specifically indicates that the standards contained in the revenue procedure **do not apply** to medical residents or interns because the services performed by these employees cannot be assumed to be incidental to and for the purpose of pursuing a course of study, it does apply to non-medical resident students. See Rev. Proc. 98-16, § 2.02. We have confirmed with the National Office that Rev. Proc. 98-16 is construed to provide retroactive relief and that claims can be filed for all periods in which the statute of limitations has not expired.

Rev. Proc. 98-16 sets forth a prophylactic test for determining whether a university student is an employee for FICA purposes. The requirements have been liberalized from those previously required where a student had to be a full-time student employed for less than 20 hours a week. A student can now attend classes half-time. Under the revenue procedure, the number of hours worked, the amount of earnings, the type of services

performed and the place where the services are performed are immaterial. Rev. Proc. 98-16, § 6.06.

In order to qualify for the student exception under Rev. Proc. 98-16, an individual who is a half-time undergraduate student or half-time graduate or professional student and who is not a career employee will automatically qualify for the student FICA exception. Rev. Proc. 98-16, § 6.01. Even if the student was a career employee, that employee may still qualify under the facts and circumstances test. Rev. Proc. 98-16, § 5. Based on the standards set forth in Rev. Proc. 98-16 and based on our review of the sampling provided by the [redacted] we agree that the non-medical residents meet the student FICA exception.

The primary issue that we see is the determination of the amount of FICA tax for which refunds can be sought. Rev. Ruls. 81-310 and 83-136 and Rev. Proc. 81-69 set forth the procedures for an employer to claim refunds of overpaid FICA taxes. Rev. Rul. 81-310 provides that the Internal Revenue Service may refund both the employer and employee FICA tax refunds if a written statement is provided from the employee. Rev. Rul. 81-310 also provides that the Internal Revenue Service may refund the employer FICA tax for an employee who did not furnish the requested consent and statement if reasonable efforts were made by the employer to secure them. An employer makes a reasonable effort where it attempts to notify the employee of the overpaid FICA tax. If consent is not secured, the employer claim is limited to the employer tax. It may not recover the employee portion of the FICA tax.

Of the sample of [redacted] students provided by the [redacted], only [redacted] were returned. It is not clear if the claim filed by the [redacted] includes the employer and employee FICA taxes for all students whether or not consents have been secured. While the [redacted] is entitled to claim the employer FICA for all students in which it made reasonable efforts to notify the students and secure their consent and statement, they are only entitled to recover the employee portion for those students who returned the statement and consent. Moreover, the [redacted] cannot claim the employer or employee FICA portions for those student-employees not enrolled in classes during school breaks of more than 5 weeks.[1]

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[1] Our interpretation of the 5 week rule is that school breaks of less than 5 weeks are considered temporary and the employee would not lose his status as a student during this period. For breaks over 5 weeks, such as where the student was employed but not enrolled in classes over the summer, the relationship would change from student-employee to employee only.

Considering the magnitude of the claims, we suggest that you ensure that the [redacted] complied with the employee notice requirements. You may also want to ensure that they are not inappropriately claiming the employee portion for those employees who failed to provide the statement and consent. Lastly, you may want to ensure that they are not claiming refunds for those students employed during school breaks of more than 5 weeks. In this latter regard, the student employee exception would be inapplicable only for the period where the employee's relationship changed from student employee to non-student employee (that is, only for the 5+ week period itself). The exception would apply for those periods in which the employee remained a student employee or where the relationship again changed because of re-enrollment.[2]

Please contact the undersigned at [redacted] if you have any questions. The portions of your files pertaining to the non-medical residents are returned by attachment. Due to the amount of the refund claims and the need to coordinate this nationally, we are seeking post-review from our National Office. While we do not expect this review to create an unreasonable delay, we suggest that the preliminary determination be provided to the taxpayer noting the post-review, attempts at coordination and the need for verification of the amount of the claims.

[redacted]
District Counsel

By: [redacted]
Senior Attorney

Attachments:
Partial files

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[2] As an example of the application of the student-employee exception, if the employee was enrolled in classes in the spring and fall semesters but worked at the university throughout the year, the employee would qualify for the student employee exception during the actual periods the employee was a student in the spring and fall semesters. It would not apply for the summer in which the student was not enrolled in classes. Since the 5 week rule simply defines the time when the employee's status changes, the status change is effective retroactive to the date in which the student is no longer enrolled and not at the conclusion of the 5 week period.